

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

OFFICIAL PLAN COMMITTEE OF)
OMNIPLEX COMMUNICATIONS GROUP,)
LLC,)

Plaintiff,)

v.)

LUCENT TECHNOLOGIES, INC.,)

Defendant.)

No. 4:04CV00477 ERW

MEMORANDUM AND ORDER

This matter is before the Court upon Defendant's Lucent Technologies Inc.'s Motion to Stay the Court's Order Remanding Case [doc. #30]. A hearing was held on September 3, 2004, and the Court heard arguments from the parties on the Motion.

I. BACKGROUND

Omniplex Communications Group, LLC ("Omniplex") was one of the first competitive local exchange carriers authorized by the Missouri Public Service Commission to provide commercial telecommunication services in Missouri. In July 2000, it entered into an agreement with Lucent Technologies ("Lucent") for the design, engineering, installation, and support of Pathstar Access Servers and related products. After an alleged failure by Lucent to provide the agreed products and services under the terms of the contract, Omniplex suffered significant financial losses, resulting in its filing for a voluntary petition in bankruptcy for reorganization under Chapter 11 of the Bankruptcy Code on February 28, 2001. In March of that year, the

United States Trustee appointed a committee of Omniplex's creditors ("the Creditors Committee") to represent the interests of all of Omniplex's unsecured creditors.

On April 24, 2002, the United States Bankruptcy Court for the Eastern District of Missouri entered an order confirming the Joint First Amended Plan of Reorganization ("Plan") filed by Omniplex and the creditors Committee. The Plan created the Official Plan Committee of Omniplex Group, LLC (the "Plan Committee") to conduct the post-confirmation liquidation of Omniplex. Acting under its power to sue, the Plan Committee brought suit against Lucent in a Missouri state court for fraud. Lucent filed a notice of removal based on three separate grounds, arguing the parties were completely diverse, removal was appropriate under 28 U.S.C. § 1452, and that removal was proper because the bankruptcy court expressly retained jurisdiction over this cause of action under the Plan.

The Plan Committee then filed a motion to remand the case. In considering the motion to remand, the Court noted that both the Plan Committee and Lucent agree that this action is only "related to" a case under Title 11. In support of its motion to remand the case, the Plan Committee argued that the Court was required to abstain from hearing the case pursuant to 28 U.S.C. § 1334(c)(2). Lucent, however, argued that 28 U.S.C. § 1334(c)(2) was inapplicable. In considering the motion, the Court recognized that some courts have taken the position advocated by Lucent, but noted that a majority of courts have rejected Lucent's position. Ultimately, the Court adopted the majority view and found that § 1334(c)(2) mandated that this Court abstain from hearing the case. Pursuant to this decision, the Court entered an order remanding the case to state court on July 9, 2004 (the "Remand Order"). On August 4, 2004, Lucent filed a notice of appeal with the Eighth Circuit Court of Appeals.

Lucent subsequently filed the present Motion to stay the Court's Remand Order, arguing that a stay is required to protect Lucent's right to appeal the Court's decision to abstain and remand pursuant to 28 U.S.C. § 1334(c)(2). The Plan Committee opposes this motion, arguing that a stay is not appropriate because the Court's order is not appealable and this Court lacks jurisdiction to issue a stay.

II. DISCUSSION

In determining whether to grant or deny a stay, the Court must consider four factors: (1) whether the stay applicant has made a strong showing of likely success on the merits; (2) whether denying a stay will cause irreparable injury; (3) whether granting a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Rife v. Ashcroft, 374 F.3d 606, 615 n.3 (8th Cir. 2004).

A. Success on the Merits

To make a strong showing that it is likely to succeed on the merits, Lucent must first show that the Remand Order is appealable. Lucent maintains that the Remand Order is appealable and that this Court has jurisdiction to issue a stay. The Plan Committee disagrees, arguing that the Remand Order is not appealable and that this Court lost its jurisdiction to issue any further orders in this case when it remanded the case to the state court.

28 U.S.C. § 1334 governs bankruptcy proceedings and dictates the circumstances under which a district court may or must abstain from hearing certain kinds of claims. Under § 1334(c)(1), any abstention decision is considered discretionary and is therefore reviewable. See S.G. Phillips v. City of Burlington, 45 F.3d 702, 708 (2nd Cir. 1995). However, abstention decisions made pursuant to § 1334(c)(2) are mandatory. Id. As the Court noted in its Remand

Order, the text of § 1334(c)(2) mandates that a district court not hear a case where a state court action is commenced, the only basis for the court's jurisdiction is § 1334, the case is "related to" a title 11 case, the matter can be timely adjudicated in state court, and the plaintiff makes a timely motion. In its Remand Order, the Court stated that its abstention decision was mandated by § 1334(c)(2). Under 28 U.S.C. § 1334(c)(2) "any decision to abstain or not to abstain . . . is not reviewable by appeal or otherwise." 28 U.S.C. § 1334(d). As explained more fully below, the Court has been presented with no clear exception to this statutory prohibition.

Lucent argues that, because the Remand Order is an abstention-based order, it is appealable. Further, Lucent maintains that some courts have specifically recognized a limited right to appeal § 1334(c)(2) abstention decisions, despite the clear statutory language prohibiting such appeals. First, to support its claim that abstention-based orders are appealable, Lucent points to cases supporting the proposition that an abstention-based remand order is appealable as a final order under 28 U.S.C. § 1291. *See, e.g., Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). Cases such as Quackenbush, however, are distinguishable in that they involve discretionary remand orders; as already explained, a remand order under § 1334(c)(2) is mandatory.

Lucent argues that this distinguishing fact does not affect the reviewability of the remand order. In making this argument, Lucent points to two cases which it asserts establish that § 1334(c)(2) decisions are subject to limited review, despite the statutory prohibition against review. First, Lucent points to S.G. Phillips Constructors, Inc., v. City of Burlington, 43 F.3d 702 (2nd Cir. 1995), a bankruptcy proceeding case. In S.G. Phillips, the bankruptcy court had dismissed a certain claim, and that decision was appealed to the district court. The district court

found that the bankruptcy court lacked jurisdiction over the claim because the claim was not a “core” claim under 28 U.S.C. § 157(b)(2) and ultimately concluded that the bankruptcy court lacked jurisdiction pursuant to the mandatory abstention rule. Id. at 704. The Second Circuit determined that the district court was incorrect and that the bankruptcy court did in fact have “core” jurisdiction over the claim. Id. at 706. The Second Circuit determined that, because “abstention is only mandated with respect to non-core matters,” any abstention decision could only have been made pursuant to § 1334(c)(1), which leaves abstention in the court’s discretion. Id. at 708. Because the claim did involve a “core” matter, the mandatory § 1334(c)(2) abstention rule could not apply. Id. In reaching this conclusion, the court noted that “[w]hile Congress proscribed general review of mandatory abstention, we have recognized limited reviewability of abstention decisions under § 1334(c)(2) to ensure that the statutory requirements prerequisite to mandatory abstention are met.” Id.

Although the court in S.G. Phillips did review a remand order that had been made pursuant to 1334(c)(2), it did so only after concluding that the district court had incorrectly determined the claim to be “non-core,” when it was, in fact, “core.” The court’s statement regarding the limited reviewability of abstention decisions under § 1334(c)(2) appears to relate to its ability to determine whether the claim is “core,” and therefore subject to the mandatory abstention rule, or whether it is “non-core,” and therefore not subject to the mandatory rule. The parties in the instant case have agreed that this action is only “related to” a case under Title 11 and that it is therefore not a “core” proceeding, eliminating the need to review any “core” versus “non-core” determination. There is no indication that the limited reviewability discussed by the S.G. Phillips court extends to the type of review that Lucent seeks here.

In further support of its claim that the Remand Order is appealable, Lucent points to Xiong v. State of Minnesota, 195 F.3d 424 (8th Cir. 1999), a case in which a certain claim was remanded to the state court. On appeal, the plaintiffs argued that 28 U.S.C. § 1447(d) foreclosed review by the Eighth Circuit. The court acknowledged this general bar to review, but noted that “[w]hen a district court remands a properly removed case on grounds the court lacks authority to consider . . . § 1447(d) does not bar review.” Xiong at 426. According to the Eighth Circuit, “the district court ignored . . . controlling precedent and made its own directly conflicting determination that removal was improper.” Id. Because the district court made the remand decision contrary to controlling precedent, the Eighth Circuit determined that it could review the order. Lucent argues that the Eighth Circuit will make a similar exception in the instant case, making it likely the Eighth Circuit will review the Remand Order. However, as with Quackenbush and S.G. Phillips, this case is distinguishable in that the remand decision in the instant case was made in accordance with the statutory requirements and was not made contrary to any controlling precedent.

The clear language of § 1334(d) indicates that Congress intended § 1334(c)(2) abstention decisions to be non-reviewable. Further, because a decision to abstain necessarily includes a decision to remand, 1334(d)’s prohibition against reviewability applies to both the decision to abstain and the decision to remand. The Court can find no clear exception to this prohibition and must therefore conclude that the Remand Order is not appealable.¹

¹Given this Court’s conclusion that the Remand Order is not appealable, the Court also notes that it agrees with The Plan that it has lost jurisdiction to issue a stay order in this case. See Browning v. Navarro, 743 F.2d 1069, 1078 (5th Cir. 1984) (“It is axiomatic that remanding a case to state court terminates the jurisdiction of a federal bankruptcy or district court over that case.”); Federal Deposit Insurance Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979)

Even if Lucent could make a strong showing that the Remand Order is appealable, it would still have to demonstrate its likely success on appeal. Lucent argues that it is likely to succeed on its appeal because the Eighth Circuit will agree with its position that this Court was not required to abstain and remand the case pursuant to 28 U.S.C. § 1334(c)(2). The Plan Committee maintains that this Court's determination that it must abstain pursuant to § 1334(c)(2) was correct and that Lucent therefore will not succeed on appeal. Because the Court has determined that the Remand Order is not appealable, it need not reach this argument. The Court notes, however, that Lucent has presented nothing which changes the Court's previous conclusion that abstention under § 1334(c)(2) is proper. Because the statutory requirements for abstention under § 1334(c)(2) were met, Lucent is unlikely to prevail on the merits even if the Remand Order is found to be appealable.

B. Remaining Factors: Harm to the Parties and the Public Interest

The remaining Rife factors also counsel against a stay in this case. Lucent will not be irreparably injured absent a stay because the Remand Order is not reviewable; and, even if the Remand Order is found to be reviewable by the Eighth Circuit, Lucent is unlikely to prevail on the merits of such an appeal. Further, the issuance of a stay would cause an unnecessary time delay in

("The law in this circuit is clear that once a district court has decided to remand a case and has so notified the state court, the district judge is without power to take any further action."). In support of its assertion that this Court does have jurisdiction to stay its own order, Lucent points to several cases. See, e.g., Hudson United Bank v. LiTenda Mortgage Corp., 142 F.3d 151 (3rd Cir. 1998) (mailing of a remand order did not divest district court of jurisdiction to consider a motion for reconsideration after it remanded pursuant to § 1367(c)); Thomas v. LTV Corp., 39 F.3d 611 (5th Cir. 1994) (discretionary remand orders are reviewable either by the district court or on appeal and the district court therefore retains jurisdiction). The Court notes that cases such as these involve discretionary remand orders. These cases support the proposition that a district court retains jurisdiction over its *discretionary* remand orders, but do nothing to refute The Plan's contention that the Court loses jurisdiction after making a *mandatory* remand order.

the adjudication of this case.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Stay the court's Order
Remanding Case [doc. # 30] is **DENIED**.

Dated this 14th day of September, 2004.

A handwritten signature in black ink, appearing to read "E. Richard Webber", written in a cursive style.

E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE